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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-440

COUNTY OF SONOMA, EUGENE D. WILLIAMS, individually and in his official capacity as County Clerk, MABEL TONKIN, individually and in her official capacity as Clerk of Municipal Court, HERB SNYDER, individually and in his official capacity as County Recorder, VICTOR MARTINEZ, individually and in his official capacity as Head of the Collections Department
Petitioners

vs.

EVA ISBELL, CLEVIE PEARSON and OMEGA PEARSON,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: October 12, 1978

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents Eva Isbell, Clevie Pearson and Omega Pearson respectfully request that this Court deny the petition for Writ of Certiorari, seeking review of the California Supreme Court's opinion in this case. That opinion is reported at 21 Cal.3d 61 *rehrg. denied as modified,* 21 Cal.3d 561a (1978).

STATEMENT OF THE CASE

In this action, respondents Eva Isbell and Clevie and Omega Pearson sought a declaration that the California

Confession of Judgment procedure found at California Code of Civil Procedure Sections 1132(a), 1133 and 1134 is violative of the Due Process Clause of Fourteenth Amendment of the United States Constitution and the Due Process Clause of the California Constitution. More specifically respondents sought a declaration that the judgments entered against them were void.

Respondent Isbell was an inmate in the Sonoma County jail when she was confronted by a county official who presented her with a confession of judgment form to sign for the alleged amount of welfare overpayment. Petition A-27. In this document she confesses judgment for the sum of $596.98 "plus medical to be determined." Petition A-30.

On January 27, 1967, this confession of judgment was entered against Isbell in Sonoma County Municipal Court case No. 18465. It must be assumed that no notice of this entry of judgment was received by respondent Isbell because there is no address for Isbell on the document. Petition A-30.

Respondents Pearson were confronted by a county official in their home with the facts of an alleged welfare overpayment and were then requested to sign a confession of judgment form in the amount of the alleged overpayment. Petition A-29. The document they signed confesses judgment for the sum of $193.00. Petition A-31. On February 16, 1966, this confession of judgment was entered against the Pearsons in Sonoma County Municipal Court Case No. 16406. It must be assumed that no notice of this entry of judgment was received by the Pearsons because there is nothing on the document which shows their address. Petition A-31.

As a practical matter, the above judgments, are no longer of any force or effect. These judgments against respondents are now more than ten years old and execution upon them has never been stayed during the pendency of this action in the trial court, the California Court of Appeal and the California Supreme Court.

The California Supreme Court, upon analysis of the California confession of judgment procedure presented by the facts of this case, held that since the California statutes did not provide any procedure for determining whether an alleged debtor's waiver of his or her due process rights was voluntary, knowing, and intelligent, the statutes violated the debtor's right to due process of law under the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

INTRODUCTION

Petitioners seek review of the California Supreme Court's decision declaring the judgments entered against respondents void for having violated respondents' rights to due process of law. However, as set forth above, these judgments are now more than ten years old and unenforceable against respondents under California law. Since these judgments are no longer enforceable against the respondents, the parties lack a legally cognizable interest in the outcome of further review of this case, and therefore no "case or controversy" is presented.

Should this Court consider the merits of the County's Petition, however, it is clear that no grounds justify the exercise of this Court's certiorari jurisdiction in this case. The California Supreme Court has declared the California

confession of judgment procedure unconstitutional on the ground that the statutory procedure violates the due process clause of the Fourteenth Amendment. As we will show below, that decision was correct and should not be disturbed by this Court.

Under the California statutory frame-work, a confession of judgment may be entered without action in any court of competent jurisdiction for money due or to become due, or to provide security against contingent liability on behalf of a defendant or for both purposes. Code Civ. Proc. 1132(a). The confession must be in writing and signed by the defendant. Code Civ. Proc. 1133. Additionally it must contain a verified statement by the defendant authorizing the entry of judgment for a specified sum; if it is for money due or to become due, it must concisely state the facts from which the debt arose and that the sum confessed is justly due or will become due. *Id.* And if its purpose is to secure the plaintiff against contingent liability, the document must concisely state the factual basis of the liability and that this sum does not exceed the actual amount of the liability. *Id.*

This statement is then filed with the clerk of the court who must endorse it and enter a judgment for the amount confessed plus certain statutory costs. Code Civ. Proc. § 1134. This statement and affidavit with the judgment endorsed upon it then becomes the judgment roll. *Id.*

Whatever "protection" this statutory scheme affords persons who are asked to sign confessions of judgment must be contrasted with the protections that are *not* afforded by either statutory procedure or court rule. These include:

(1) The statute does not require that the confession of judgment document contain any notice to the signor that he is waiving his constitutional rights to contest the debt, to raise defenses like the statute of limitations, and to notice that a judgment has been entered against him.

(2) The statute does not require that the alleged debtor's address be included on the form.

(3) The statute does not provide that there be any consideration for the execution of the Confession of Judgment.

(4) The statute does not provide that an alleged debtor should consult an attorney before signing,[1] or require an attorney's approval.

(5) The California statutes do not provide that the defendant be notified of the Entry of Judgment against him.

(6) The California statutes do not provide that defendants be informed of any rights to attack or vacate the judgment, nor do they provide any procedure for determining whether the waiver of constitutional rights was knowing, intelligent, and voluntary.[2]

(7) The California statutes do not provide any procedure for attacking an incorrect judgment unless it can be proven that the judgment was based on extrinsic fraud.

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[1]Compare Code Civ. Proc. § 1133 with Code Civ. Proc. § 412.20 which requires such notice on summonses in ordinary actions.

[2]Even if the defendant somehow learns of the judgment, Code Civ.Proc. § 473 only allows him to vacate it if he moves within six months of entry of judgment and can prove that the judgment was entered due to mistake, inadvertence, surprise or excusable neglect. Beyond six months, the judgment can only be vacated if it can be proven it was entered as a result of extrinsic fraud.

Respondents submit that should this Court reach the merits of petitioners' claim that certiorari should be granted, the decision of the California Supreme Court invalidating California's Confession of Judgment procedure is entirely consistent with this Court's decision in *Overmyer v. Frick,* 405 U.S. 174 (1972). Moreover, it is also consistent with the decisions of the lower courts which have ruled on this issue. Finally, respondents will also demonstrate that the California Supreme Court's decision does not preclude a legislative solution that will strike a proper balance between commercial interests and the due process rights of individuals.

1. Because of the Lack of a Present "Case or Controversy" Within the Meaning of Article III, Section Two of the United States Constitution, This Court Should Not Grant a Writ of Certiorari in the Present Case.

It is axiomatic that in order for this Court to have jurisdiction on an appeal, there must be issues that present a "case or controversy" within the meaning of Article III, Section two of the Constitution of the United States. This Court has stated repeatedly that the duty of the federal court "is to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon moot questions or abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the particular case before it." *Mills v. Green,* 159 U.S. 651, 653. (1895); *United States v. Alaska S.S. Co.,* 253 U.S. 113, 116 (1929); *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-241 (1937). "[S]imply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell*

v. McCormack, 395 U.S. 486, 496, (1969).[3] Thus it is clear that federal courts do not have power to decide cases where "there is no longer an adversary relationship between parties having a legally cognizable interest in the outcome of the [particular] case." *Powell v. McCormack, supra.* Respondents in the present case respectfully suggest that there is no longer a concrete controversy touching the legal relationship between the County of Sonoma and respondents herein.

The confessions of judgment entered against respondents Isbell and Pearson are over ten years old. The judgment against respondent Isbell was entered against her on January 27, 1967 in the Sonoma County Municipal Court, and the judgment against the Pearsons was entered against them on February 16, 1966. Because these judgments were entered over ten years ago, no separate action upon either of these judgments can be brought against the respondents. California Code of Civil Procedure, § 335 and § 337.5, subdivision 3.[4]

Moreover the County of Sonoma cannot presently have a writ of execution or writ for the enforcement of the present judgment issued as a matter of right. Again, the reason

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[3]The requirement of a "case or controversy" applies to an action for declaratory relief. *Super Tire Engineering Company v. McCorkle,* 416 U.S. 115, (1974). This requirement also applies to this Court's power to hear cases from state courts. *See Richardson v. Ramirez,* 418 U.S. 24, 36 (1974).

[4]§ 335 of the California Code of Civil Procedures provides:
"The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"
§ 337.5 of the California Code of Civil Procedures provides a pertinent part:
"Within 10 years:
. . .
3. An action upon a judgment or decree of any court of the United States or of any state within the United States."

for this limitation on such normal judgment creditor remedies is that a ten year period since the entry of the confession of judgment has expired. *See* California Code of Civil Procedure, § 681.[5] Thus the County of Sonoma is no longer entitled to the enforcement of its judgment in the present case either by writ of execution or by an independent action based upon such judgment.[6] The respondents correspondingly are no longer obligated to pay anything to satisfy these judgments.

Thus there is no longer an adversary relationship between parties having a cognizable interest in the outcome of the case. Any decision by this Court can have no effect upon the matter at issue in this particular case. This Court cannot rejuvenate or make effective the expired judgments herein.

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[5] § 681 of the California Code of Civil Procedure provides:
"The party in whose favor judgment is given may, at any time within 10 years after the entry thereof, have a writ or order issued for the execution or enforcement of the judgment. If, after the entry of the judgment, the issuing of such writ or order is stayed or enjoined by any judgment or order or court, or by representation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the 10 years within which execution or order may issue."

[6] Respondents are familiar with California Code of Civil Procedure Section 685 which sets out steps which must be taken before a writ of execution may be obtained after the expiration of ten years from the date of entry of judgment. The case law interpreting this section makes it clear that in order to take advantage of this section a judgment creditor must show the court that during the period of time following the entry of judgment, he has exercised due diligence in locating and levying upon property owned by the debtor. *See, e.g., Lohman v. Lohman,* 29 Cal.2d 144, 148-149 (1946); *Di Corpo v. Di Corpo,* 33 Cal.2d 195 (1948); *Butcher v. Brouwer,* 21 Cal.2d 354 (1942). Moreover, a court, even after a showing of due diligence, may deny its process where a debtor shows circumstances which evidence that a creditor is not now entitled to collect on his judgment. *Lohman v. Lohman, supra,* 29 Cal.2d at 149. The County of Sonoma has never taken any steps to invoke the provisions of Code Civ. Proc. § 685 in this case.

Therefore, because any decision by this Court can have no effect on the matter in issue, the case is moot. *See Mills v. Green, supra,* at 653; *North Carolina v. Rice,* 404 U.S. 244, 246 (1971); *United States v. Alaska S.S. Company, supra,* at 116.

2. The County of Sonoma Has Not Used a Confession of Judgment Since 1974 and for That Reason This Case Does Not Present a "Case of Controversy" Necessary to Invoke the Judicial Power Conferred on This Court by Article III of the United States Constitution.

Attorneys for the respondents have gone through the court files of the Superior and the Municipal Courts of the County of Sonoma and have found no confession of judgment filed therein after 1974. *See* Affidavit of David C. Lewis attached in the Appendix.[7] Additionally, particular note should be taken of the fact that nowhere in the petition for certiorari do petitioners say that they use this device presently or intend to use it in the future. Basically they have abandoned this procedure as a means of resolving disputes which arise in welfare fraud or overpayment cases. Since the County of Sonoma no longer uses confessions of judgment in these particular cases, there is correspondingly a lack of necessary viable controversy between the County of Sonoma and the respondents herein. Because there is no longer a viable controversy between the two parties, there

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[7] It is suggested by respondents that the rule against reference to facts outside the record does not apply in situations where mootness is possible since the facts concerning such problems almost always occur outside the record of the case below. Since the absence of a controversy is jurisdictional, the point is not one that counsel may disregard. *See United States v. Alaska S.S. Company, supra,* at 116. *See also Stern and Gressman, Supreme Court Practice* pp. 896-897 (5th Ed. 1978).

is no "case or controversy" as understood by the Article III which would allow this Court to hear this matter. *Powell v. McCormack, supra.*

3. The Decision of the California Supreme Court in Isbell v. County of Sonoma is Not in Conflict With the Decision of This Court in Overmyer v. Frick.

The decision of the California Supreme Court in this case is entirely consistent with this Court's decision in *Overmyer v. Frick, supra.* Both *Isbell* and *Overmyer* begin the constitutional analysis by finding the case before them to involve the deprivation of property within the purview of the due process clause of the Fourteenth Amendment. Any such deprivation requires some form of notice and an opportunity to be heard. In *Overmyer* this Court, stating that these due process rights are subject to waiver, announced that a valid waiver must be voluntarily, knowingly and intelligently made. 405 U.S. at 185.

In *Overmyer,* this Court analyzed the transactions between the parties and found the corporate parties to have bargained at arm's length and entered into a negotiated contract where adequate consideration was given for the cognovit clause in the note. Given all the circumstances preceding execution of the promissory note containing the cognovit clause, this Court held that the Overmyer Company voluntarily, intelligently and knowingly waived its rights to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences. 405 U.S. at 187.

Having found a valid waiver in the case before it, this Court did not undertake to analyze explicitly the constitutionality of the Ohio confession of judgment procedure.

However, this Court in its concluding comments (405 U.S. at 188), points out that the Ohio procedure which it has implicitly upheld provides for notice of entry of the judgment and a postjudgment hearing at which the defendant can vacate the judgment if a valid defense exists.[8]

The California procedure at issue here is far harsher than the Ohio procedure before this Court in *Overmyer.* This Court recognized in *Overmyer* that more onerous procedures might not be constitutional:

> Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor received nothing for the cognovit provision, other legal consequences may ensue. 405 U.S. 188.

In following the admonition of this Court in *Overmyer,* the California Supreme Court analyzed the confession of judgment procedures which affected the respondents in this case. In *Isbell,* the court prefaced its summary of the facts by stating "Although confessions of judgment are usually employed to enforce claims of private creditors, the instant action presents perhaps *a more doubtful usage.*" 21 Cal.3d 65 (Emphasis added). The court implicitly finds from the stipulated facts that there is great disparity in bargaining power between the County and the welfare recipients who signed confessions of judgment without receiving any consideration for doing so. Then the California court undertakes an exhaustive examination of the legal consequences

[8]Justice Douglas, in his concurring opinion at 405 U.S. 189, emphasizes that the Ohio procedure for reopening a confession of judgment presents only a "minimal obstacle."

to these confession of judgment welfare debtors under the California confession of judgment procedure.

The California court finds that the California statutory procedure: 1) results in entry of final judgment upon presentation of a signed confession of judgment to the court clerk; 2) contains no provision in the procedure for notice of entry of judgment to the debtor, and 3) does not provide any opportunity for hearing to present evidence that the judgment should not be entered. 21 Cal.3d at 66-67. The Court then concludes, citing *Overmyer,* that such a procedure, in allowing a judgment to be entered without prior notice and hearing, is constitutional "only if the confession constitutes a *valid waiver* of the debtor's due process rights." 21 Cal.3d at 69 (Emphasis the court's).

In determining whether a waiver has been shown, the Court first notes that "waiver of constitutional rights is not presumed." 21 Cal.3d at 68.[9]

Since there are no cases dealing with confessions of judgment based on welfare related debts, the California court analogizes to the cases and commentaries concerning confessions of judgment in consumer credit transactions in an attempt to establish whether the signed confession document itself demonstrates that the debtor has in fact made a voluntary, knowing and intelligent waiver. The court concludes that the cases and commentaries uniformly demonstrate that the signed confession document

[9]The California court notes that welfare debtors are not included in the several categories of debtors the California Legislature has excluded from the use of confessions of judgment, nor are they benefited by recently enacted protections covering consumer transactions (Code Civ. Proc. § 1132(b)). 21 Cal.3d at 67.

"*cannot,* on its face, represent a voluntary, knowing and intelligent waiver." 21 Cal.3d at 71. (Emphasis added)

The court then addressed the petitioners' contention that the sufficiency of the debtor's waiver must be determined on a case by case basis. It found, however, that under the California statutes, there is no provision for a case by case determination as there is in the Ohio procedure. The signed confession must be entered as a final judgment upon presentation to the clerk. Code Civ. Proc. § 1134. The clerk has no authority to reject confessions on the ground that the document does not adequately prove a valid waiver. Moreover, there is no procedure available to a defendant to challenge the validity of the waiver. Upon a thorough analysis, as instructed by *Overmyer,* of the facts of this case as they lead step by step through the California confession of judgment procedure to entry of final judgment, the California Supreme Court is unable to find the existence of the constitutional due process protections of notice and a hearing or a voluntary, knowing and intelligent waiver of notice and hearing. The California court holds that a judgment entered pursuant to the California procedures is therefore constitutionally defective. 21 Cal.3d at 71.

The California Supreme Court nowhere says that a confession of judgment is *per se* violative of Fourteenth Amendment due process. Rather, the California Supreme Court simply holds that because the confession document itself cannot demonstrate a valid waiver of due process rights, and because the California procedure, unlike Ohio's, provides for entry of judgment on a confession without any opportunity to challenge the validity of a waiver, that procedure is violative of due process. Thus the California

Supreme Court's decision is consistent with this Court's decision in *Overmyer*.

4. Lower Courts Are Consistent in Following Overmyer v. Frick.

Petitioners assert that lower courts applying the *Overmyer* decision have created a conflict as to whether due process requires that a hearing on the validity of a waiver must precede the entry of judgment. Analysis of the cases cited shows no such operative conflict in cases which have considered confession of judgment procedures.

This Court's decision in *Overmyer v. Frick, supra,* held that confessions of judgment are not unconstitutional *per se* and that a valid waiver of constitutional due process rights may be found upon analysis of a given case. This Court analyzed the transactions between the Overmyer Company and Frick and found a valid waiver. This Court did not go on to analyze the Ohio confession of judgment procedure to determine whether it established a constitutionally adequate procedure for assuring that a valid waiver of due process rights had occurred. The Court only implicitly upheld the Ohio statutory procedure; it did not decide the question of the timing of a hearing consonant with due process requirements.

In the cases cited by petitioners, courts have considered the confession of judgment procedures of eight states. These cases are:

OHIO

Overmyer v. Frick, 405 U.S. 174 (1972)

PENNSYLVANIA

Swarb v. Lennox, 405 U.S. 191 (1972)

NEVADA

Tunheim v. Bowman, 366 F.Supp. 1392 (D.Nev. 1973)

MARYLAND

Billingsley v. Lincoln National Bank, 320 A.2d 34 (1974)

ILLINOIS

Irmco Hotels v. Solomon, 326 N.E.2d 542 (1975)
Starr Finance v. McGee, 326 N.E.2d 518 (1975)
Scott v. Danaher, 343 F.Supp. 1272 (N.D. Ill. 1972)

LOUISIANA

Buckner v. Carmack, 372 So.2d 326 (1973)

DELAWARE

Osmond v. Spence, 327 F.Supp. 1349 (D.C. Del. 1971) and 359 F.Supp. 124 (D.C. Del. 1972)

CALIFORNIA

Isbell v. County of Sonoma, 21 Cal.3d 61 (1978)

The Ohio, Pennsylvania, Maryland, Illinois and Louisiana confession of judgment procedures provide for notice of entry of judgment and an opportunity for a postjudgment hearing on valid defenses. These procedures were upheld by the courts which considered them as being consistent with *Overmyer*.

The courts in *Tunheim, Billingsley, Irmco* and *Starr* were presented with *per se* challenges to the constitutional validity of the confession of judgment procedures involved. Those courts followed *Overmyer* in that they rejected the *per se* challenge to validity of the statutes.

The *Buckner* and *Scott* cases involved challenges to the execution and garnishment procedures of Louisiana and Illinois, respectively, where the underlying judgments were

based on a confession of judgment. The thrust of both cases was the overall constitutionality of execution and garnishment procedures, and although both courts discussed, in dictum, confession of judgment procedures with respect to notice and hearing, the validity of the underlying confession of judgment procedures was not expressly before the courts.

The only lower courts to deal with challenges not alleging *per se* unconstitutionality of confession of judgment procedures were the U.S. District Court for Delaware in *Osmond v. Spence, supra,* and the California Supreme Court in *Isbell v. County of Sonoma, supra.* In both these cases, the courts were presented with procedures which provided no notice of entry of judgment and no opportunity for a post-judgment hearing on a valid defense. While both courts indicated that notice and hearing should precede entry of final judgment (359 F. Supp. at 127; 21 Cal.3d at 71), the actual holding in both cases is limited to finding the statutes unconstitutional based on the total absence of notice of entry of judgment and opportunity for a hearing at *any* time. Thus, since the relief fashioned by the Delaware and California courts did not hold all prior judgments by confession void *per se* but only required procedures allowing judgment debtors with a valid defense to apply for a hearing, there is no conflict between these decisions and the other lower court decisions, nor with *Overmyer.*

The lone case where a hearing has been required prior to entry of judgment by confession is *Virgin Islands National Bank v. Tropical Ventures, Inc.,* 358 F. Supp 1203 (D.V.I. 1973). The circumstances there were so unique, however, that it hardly warrants certiorari jurisdiction. In

the Virgin Islands case, an action had been filed in federal court, and there had been no appearance by defendant. Plaintiff's attorney wished to enter judgment on a confession of judgment, but there was no procedure to follow. The district court in the absence of a procedure, required plaintiff's attorney to notify defendants of an opportunity to challenge the waiver of constitutional rights before he would allow judgment to be entered. Thus, any conflict it may have created with *Overmyer* is limited to the use of confessions of judgment in federal court, and it is of limited precedent in states with established confession of judgment procedures.

Petitioners also argue that because reported cases which have considered the conduct of hearings on the validity of the waiver of constitutional rights in a confession of judgment differ in the assignment of the burden of proving valid waiver, certiorari is appropriate. However, the assignment of the burden of proceeding at the hearing is generally a matter of state law which scarcely rises to the level of a substantial federal question required by Rule 19(1)(a).[10]

Petitioners have not shown the existence of state court decisions not in accord with the decisions of this Court.

5. Concern For Commercial Consequences Should Be Addressed to the Legislature.

Petitioners and Amici Curiae, the Carpenter Trust Funds For Northern California, allege that the California Supreme Court's decision in this case will have serious consequences for this country's commercial and court systems,

[10] *Cf. Lindsey v. Normet,* 405 U.S. 56, 65-69. (1972)

and therefore this Court should exercise its discretion to review that decision. They raise the specter of "knowledgeable parties" being coerced to parade to the already mobbed courthouse doors in order to resolve disputes in the commercial arena. Then they suggest that these well informed parties will be compelled to the further use of attorneys in every case involving commercial disputes. In addition, they state that these consequences infringe upon the rights of well informed parties to take their commercial destiny into their own hands. In essence, this Court is asked to believe that the foundations of commerce and the court system will be dealt an incapacitating blow unless this Court springs to the rescue.

Nothing could be further from the truth. There are procedures other than confessions of judgments available to well informed parties in the world of commerce. Clearly, nothing in the decision by the Supreme Court of California precludes the use of stipulated judgments, or the taking of default judgments. *See Isbell v. County of Sonoma, supra,* 21 Cal.3d at 75 n.9.

Indeed, petitioners appeal is to the wrong forum.[11] The California Supreme Court's opinion in no way precludes the legislature from remedying the constitutional deficiency in the challenged statutes. Unquestionably it is possible to draft a statute that would include a mechanism for a judicial officer to determine the facial validity of a purported waiver of due process rights.

The prognosis by Amici Curiae that no such statute can be drafted is overly pessimistic. First, in reaching that

[11]This Court has stated, "problems of this kind are peculiarly appropriate grist for the legislative mill." *Swarb v. Lennox,* 405 U.S. 191, 202 (1972).

position Amici misinterpret the California Supreme Court's opinion. The California Supreme Court did not hold that there could not be a valid waiver of due process rights; it did analyze the California statutory procedure in regard to confessions of judgment, finding that there was no statutory mechanism for determining the validity of a purported waiver since an alleged debtor's signature on a document could not, *ipso facto,* demonstrate a valid waiver. Moreover, that a suitable procedure can be adopted is graphically demonstrated by the experience in Delaware. After the Delaware confession of judgment procedure was invalidated in *Osmond v. Spence, supra,* the Delaware legislature enacted a new provision that would appear to meet the constitutional objections that led the court to invalidate California's procedure.[12]

Certainly the California Legislature can draft a comparable provision that protects both amici's commercial interests and the due process rights of individuals like respondents.

[12]Delaware Code Annotated tit.10, Sec. 2306(b) reads:
"A judgment by confession shall not be entered as a final judgment, effective in all respects as a judgment after trial, until the Prothonotary gives written notice to the defendant-obligor by certified mail, return receipt requested, of an opportunity for a judicial determination as to whether the defendant-obligor understandingly waived his right to notice and an opportunity to be heard prior to the entry of final judgment against him."

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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RICHARD M. PEARL
WILLIAM C. MCNEILL, III
Counsel for Respondents.

Dated: October 12, 1978

(Appendix Follows)

APPENDIX

Appendix

AFFIDAVIT

State of California
County of San Francisco } ss

I, DAVID C. LEWIS, being first duly sworn, declare and state:

I am an attorney licensed to practice law in the State of California.

I have engaged in the practice of law in the County of Sonoma continuously since January 1974.

I have been the attorney for Eva Isbell and Clevie and Omega Pearson since the inception of their action for declaratory relief against the County of Sonoma.

I am familiar with the system of indexes, registers and files in the Municipal Court of the County of Sonoma, and in the Superior Court of the County of Sonoma.

I have reviewed the contents of Sonoma County Municipal Court files No. 18465, *County of Sonoma v. Isbell,* and No. 16406, *County of Sonoma v. Pearson,* and I find each of the files to contain a single document captioned "Confession of Judgment." Copies of those documents are found at pages A-30 and A-31 of the Petition for Certiorari.

I have examined every case filed by the County of Sonoma in the Municipal Court of Sonoma County for the years 1974 through 1978. There has been no supplemental proceeding or action on judgment filed against defendants Isbell or Pearson.

Furthermore, examination of the Municipal Court filings by the County of Sonoma reveals that after the year 1974 the County of Sonoma has not filed a single action based on a confession of judgment.

I have examined the indexes and registers of the Superior Court of the County of Sonoma for the period of 1974 through 1978, and have found no case filed by the County of Sonoma as plaintiff which was based on a confession of judgment.

Executed in San Francisco, California this 10th day of October, 1978.

/s/ DAVID C. LEWIS
David C. Lewis

Subscribed and sworn to before me this 10th day of October, 1978.

(Seal) /s/ GLORIA HOWELL
Notary Public, County of San Francisco, State of California